Docket No. 10,994.

United States Court of Appeals

FOR THE SIXTH CIRCUIT.

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
Plaintiffs-Appellants,

vs.

GENEVA METAL WHEEL COMPANY,
Defendant-Appellee.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

REPLY BRIEF FOR THE PLAINTIFFS-APPELLANTS.

DAVIS & YOUNG,
400 National City Bank Bldg.,
Cleveland, Ohio,
MEYER A. COOK,
605 National City Bank Bldg.,
Cleveland, Ohio,
Attorneys for Plaintiffs-Appellants.

BULKLEY, BUTLER & RINI,
Bulkley Bldg., Cleveland, Ohio,
KENNETH D. CARTER,
N B C Building, Cleveland, Ohio,
Attorneys for Defendant-Appellee.

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RESOLVING THE QUESTION INVOLVED.

Throughout this brief the parties herein will be referred to as plaintiffs and defendant as they stood in the trial court.

In order that the Court might have the issue to be adjudicated on this appeal properly before them, the plaintiffs, in the original brief, presented what they felt to be the problem to be resolved. This problem, having been set forth in the original brief, need not be repeated here. Believing theirs to be an accurate statement of the question, as drawn from the position assumed by the plaintiffs and the testimony adduced at the trial, it was, indeed, with some surprise that the plaintiffs were confronted with the respondent's statement of the elements at issue as enumerated in defendant's brief. However, should this Court feel that defendant's version of the issues is a proper one, plaintiffs

will herein discuss them in the order in which defendant's brief treats them.

CRITICISM OF DEFENDANT'S COUNTER-STATEMENT OF FACTS.

Plaintiffs substantially agree with defendant's version of the facts, but feel that some of the facts as set forth are not only misleading but unwarranted by the state of the testimony and evidence adduced in the trial court.

At page 2 of its brief, defendant says:

> "Two other wheel makers, Parish Stamping Company and Dico Company, make similar wheels for use on wheelbarrows. (R. 27, 219.)"

A careful examination of the record at the above pages reveals what little probative effect such testimony has and explains why plaintiffs feel that the above quotation was not established as a *fact*. At page 27, Mr. Branch, defendant's chief engineer, states:

> "A. I have seen a similar wheel manufactured by Parish Stamping Company of Reading, Pennsylvania. I have seen *photographs* of a similar wheel manufactured by the Dico Company of Des Moines, Iowa.
>
> "Q. Were they similar in all respects to the Geneva wheel? A. *I did not examine them closely,* as I would a Geneva wheel. Therefore, *I could not truthfully answer your question.* They looked similar, they had a similar appearance." (Emphasis supplied.)

And at page 219 of the record, Henry Carter, defendant's president, states as follows:

> "A. Well, *it is my understanding* the Jackson Manufacturing Company had a similar wheel made for them, and the Dico Company makes a similar wheel, or has it made for them.
>
> * * * * *
>
> "Q. Do you know the company that made the wheels for the Jackson Company that were similar to your DC285? A. *I'm told* they were made and

stamped in the Parish Stamping Company at Reading, Pennsylvania." (Emphasis supplied.)

Thus, neither of the above witnesses could definitely state from their own personal knowledge or observation that Parish and Dico wheels were of the same appearance and construction as a Geneva wheel. By qualifying their answers with such phrases as "I did not examine them closely," "I could not truthfully answer your question," "it is my understanding" and "I'm told," these witnesses certainly nullified any probative force their testimony might have had.

It should be noted here that in the case of Mr. Branch, after having given the above testimony, he was confronted with Plaintiffs' Exhibit 8 depicting a Dico wheelbarrow wheel. Mr. Branch himself readily found two major points of dissimilarity in that the Dico wheel contained eight rivet holes instead of six, and in that the Dico wheel has no chain hold (T. 45).

It should be further noted that defendant at no time during the course of the trial was able to produce a Dico or Parish wheel similar to their own Geneva wheel to substantiate their claim of similarity. Could it be that such wheels, in fact, are not similar?

At page 3 of its brief, defendant makes some rather slurring remarks concerning the qualification of plaintiffs' witnesses, Mr. Beno and Mr. Krashin. Plaintiffs invite this Court's attention to page 3 of their original brief wherein their witnesses' qualifications are set forth, and further invites the Court to compare said qualifications with those of defendant's Mr. Branch set forth at page 5 of plaintiffs' brief.

At the bottom of page 3, defendant states as a *fact* that plaintiffs' witness Beno admitted that the fractures were so small they could not be seen with the naked eye and were not visible until the ferrule rivet had been sawed in two, and gives as authority page 108 of the record. De-

fendant, apparently in his haste, failed to include the following testimony by the same Mr. Beno, found on the same page 108 of the record:

> "Q. So that with the naked eye, even with the photographs, you couldn't see this claimed fracture until you sawed the rivet in two? A. You wouldn't in that section of it, *but you could see it from the outside edge.* You see, I observed fractures on two of those flanges when I first secured the wheel, cracks around the outside edges; *they were visible, real plain,* at that time." (Emphasis supplied.)

Furthermore, Mr. Krashin testified that the radial cracks could have been seen at the time of manufacture (T. 153).

Defendant complains of the fact Beno and Krashin did not examine the wheel until after the accident. It occurs to plaintiffs that such is a natural circumstance, since no such accident was anticipated and, therefore, plaintiffs had no reason to call in expert engineers to minutely examine said wheel.

Defendant also points out that the wheel looked perfect to plaintiff O'Donnell at the time he was repairing the tire. Did O'Donnell have a *duty* to examine the *wheel* for defects, or even any *reason* to do so when he was merely supposed to repair the pneumatic tire? Plaintiffs think not.

DEFENDANT'S ARGUMENT DISTINGUISHED.

In section 1A found at page 5 of defendant's brief, the argument is set forth that "There is no positive proof that defendant manufactured the wheel."

Plaintiffs contend that they did offer sufficient proof that their Exhibits 1 and 2 were manufactured by defendant. A summary of such proof is discussed at pages 2 and 3 of plaintiffs' original brief, and consists of testimony given by Mr. Branch and Mr. Henry Carter, defendant's chief engineer and president respectively.

Plaintiffs feel justified in contending that defendant's refusal to deny that this was a Geneva wheel is tantamount to an admission of identity. There is much authority in the decided cases and texts for the proposition of law that the non-denial of a statement made in the presence of a party charged with liability for his negligent act, which tends to establish his liability, may amount to the admission of its truth if it appears that the statement was heard and understood by the party sought to be charged, and that he had knowledge of the facts stated, was not physically disabled from answering, had a motive for denying it, and would naturally do so if he does not intend to admit it, and was at liberty to make a reply. See *Binger v. Wildman*, 69 F. (2d) 125. See also 1 *R. C. L.* 478, 76 *A. L. R.* 1391 and cases cited therein. The only testimony defendant could muster to rebut plaintiffs' evidence as to identity of the wheel was the statement that two other companies manufactured a similar wheel and this testimony at best is questionable in view of the fact that defendant could not produce a similar wheel manufactured by someone else, which plaintiffs contend would be the natural thing to do. Such testimony becomes further weakened when considered in the light of Mr. Branch's testimony when confronted with Plaintiffs' Exhibit 8. (See page 2 *supra.*)

In section 1B found at page 6 of defendant's brief, the argument is offered that "Plaintiff O'Donnell made an unqualified settlement with his employers in consideration for $9,429.48 paid for his benefit by co-plaintiff United States Casualty Company."

This is an extremely irrelevant and weak argument hardly deserving of answer. However, for the Court's convenience, the following Illinois reported cases are cited wherein it has been consistently held that an employee who has been injured by the negligent act of a third person can bring an action to recover therefor, notwithstanding he may have been paid compensation under the act; *O'Brien v. Chicago City R. Co.*, 305 Ill. 244, 137 N. E. 214, 27 *A. L. R.*

479; *Gones v. Fisher*, 286 Ill. 606, 122 N. E. 95, 19 *A. L. R.* 760; *Cipperly v. Carmack*, 258 Ill. App. 593; *Walsh v. Central Cold Storage Co.*, 324 Ill. App. 402, 58 N. E. 2d 325; *Thornton v. Herman*, 311 Ill. App. 513, 36 N. E. 2d 840.

The reported cases in Ohio are in complete agreement with the holdings in the above-cited cases. See *Trumbull Cliffs Furnace Co. v. Shachovsky*, 111 O. S. 791; *Herbruck v. Burger Iron Co.*, 44 O. A. 475; *Ohio Traction Co. v. Washington*, 6 O. A. 273.

It is significant that defendant offers no authority for its argument.

In section 2A found at page 6 of defendant's brief, the argument is presented that "There is no proof that the wheel was defectively manufactured."

Contrary to defendant's argument, there is an abundance of proof in the record that the ferrule rivets used to hold the wheel halves together were defective causing the halves of the wheel to separate violently, thereby causing the injury complained of. (See page 4 of plaintiffs' original brief.)

Defendant's assertion that plaintiffs' engineers unjustifiedly assumed that five ferrules were defective because the sixth ferrule was thicker than the other five is rather unique when the testimony given by defendant's Mr. Branch at pages 243 and 244 of the record is considered:

> "A. I would like to first state that the steel used in the rivet was .076 plus or minus 2½ thousandths, or a total range of five thousandths.
>
> Q. So that you regarded as standard 14 gauge steel for your purposes anything from .0735 to— A. .0715—I beg your pardon, you're right, .0735 to .0785.
>
> Q. And the average then is .076? A. That's right.
>
> Q. All right. Now, what is the difference in thousandths of inches between the thickness of the metal where you made your measurements at the base of the turned-over flange on rivet number one? A. In the case of rivet number one the thickness is within the range of standard gauge. It is .074.

Q. All right. In number *3*? A. Number 3, the dimension is .0715, which would be *two thousandths under* the minimum allowed for that steel in the parent metal.

Q. And rivet number *5*? A. The measurement is .067, which would be *five and a half thousandths under* the minimum allowed; and rivet number *6* measured .0665, which would be *six thousandths under the minimum allowed.*" (Emphasis supplied.)

Thus, there is positive proof that at least three of the ferrule rivets were outside the safe tolerance as set up by Mr. Branch who *designed* the wheel. The above defects were of course in addition to the defects caused by the presence of radial and circular cracks which are more fully discussed at page 4 of plaintiffs' original brief. It cannot seriously be claimed, therefore, as defendant claims at page 7, that "In this complete absence of any proof whatever as to a defect at the time of manufacture, the District Court had no alternative but to grant defendant's motion for judgment. To do otherwise would be to invite the jury to speculate about a claimed defect concerning which there was no evidence." It is plaintiffs' contention that there was ample evidence much of which was evinced on cross-examination of defendant's own witness, its chief engineer.

In section 2B, found at page 7 of defendant's brief, the argument is proposed that "There is no proof that the discs separated because of a defect."

Contrary to defendant's assertion, there is abundant proof in the record that the separation was due solely to the defects in the ferrules of the wheel. Both Mr. Beno and Mr. Krashin unqualifiedly stated that the separation of the discs was due to defects in the ferrules existing at the time of manufacture (T. 75, 87, 156), and that in light of said defects, the wheel could have separated at an air pressure of only 40 pounds in the tire. See page 87 of the record where Mr. Beno testified as follows:

"Q. So that if a wheel was designed to withstand a pressure of 120 pounds with the ferrule in position

and of the construction of ferrule as shown in position 2, and it actually contained the ferrules of the type as shown in position number 4, it might reasonably be expected to disintegrate at something around 40 pounds being applied to the tire? A. That's possible, yes, sir."

The only *positive proof* as to the air pressure applied at the time of the accident was given by plaintiff O'Donnell at pages 162, 163, 164, 181 and 184 of the record wherein he testified that he gauged the air pressure twice before the explosion occurred and that the second time he gauged he found it to be 25 to 30 pounds.

Certainly it is uncontradicted that the air line was attached to a tank of 500 pounds capacity which had a safety valve set to maintain the air pressure in said tank between a minimum of 120 pounds and a maximum of 180 pounds. But defendant's statement that "it is highly probable that the discs separated from the application of excessive air pressure from a tank containing about 180 pounds" is pure speculation. It is inconceivable that an experienced repairman as O'Donnell was proven to be, knowing the extreme hazards of air under compression, would carefully gauge the air pressure twice before it rose to 30 pounds and then suddenly apply "about 180 pounds." Such speculation is absurd.

DEFENDANT'S CITATIONS DISTINGUISHED.

Defendant at page 8 of its brief discusses the "implement of danger" doctrine and sets forth certain arguments why that doctrine is not applicable to the case at bar. The chief reason set forth is that a wheelbarrow wheel is not an implement of danger. The case of *McPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, clearly sets forth the definition of an implement of danger, and just as clearly points out that the doctrine is not limited to poisons, explosives and things of like nature, which in their normal operation are implements of destruction. The Court's definition is set forth in opinion as follows:

"If the nature of a finished product placed on the market by a manufacturer to be used without inspection by his customers is such that it is reasonably certain to place life and limb in peril if the product is negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. This principle is not limited to poisons, explosives and things of like nature, which in their normal operation are implements of destruction."

Furthermore, all three of the engineers including Mr. Branch, defendant's chief engineer, testified in the trial court that if the ferrules were defective, the wheel would be "inherently dangerous." At pages 98 and 99 of the record, the following testimony is recorded:

"Q. Mr. Beno, assume that a wheel assembled of component parts such as you see in Plaintiff's Exhibits 1 and 2 are fastened together with ferrules of a uniform thickness, and of the same gage as that from which the wheel was made. Are you in a position upon examining Plaintiff's Exhibits 17 and 18 to express an opinion as to whether or not the wheel using ferrules of that type is safe for use, with pneumatic tire, as a wheelbarrow wheel?

* * * * *

A. The question was whether I would consider that particular wheel dangerous?

Q. That's right.

The Court: Well, unsafe for the purposes for which we stated here before it was intended, the application of the required pressure that it was supposed to withstand.

A. Well, from my examination of the wheel, and so on, I would, yes.

Q. Say what? A. Conclude that that wheel, as it had been fabricated, this particular wheel, was dangerous."

At page 146 of the record, Mr. Krashin testified as follows:

"Q. Are you in a position, Mr. Krashin, to express an opinion as to whether or not, with a wheel designed to withstand 120 pounds pressure when held together with six ferrules of the type indicated by Plaintiff's Exhibit 5, whether or not the thinning as you have described, as appears in position number 4 on Plaintiff's Exhibit 10, as to whether or not such wheel would be inherently dangerous if a pressure of 60 pounds was applied to a pneumatic tire? A. Yes.

Q. What is your opinion? A. It would be inherently dangerous."

At page 245 of the record, Mr. Branch, defendant's chief engineer who designed this wheel, testified as follows:

"Q. Would you regard that as a safe wheel? A. If the radial cracks were visible the rivet would be removed and a new rivet put in its place.

Q. And will you answer my question? You would regard the wheel that had a ferrule in it with radial cracks at the time that it was assembled as a dangerous wheel? A. If the radial cracks were visible to the naked eye. If they were not visible to the naked eye we would consider it a safe wheel.

Q. If the radial cracks were not visible you would consider it a safe wheel, but my question is: you would regard it as a dangerous wheel if the radial cracks were apparent to the naked eye at the time of its assembly? A. At the time the wheel was made, yes, sir.

Q. That's right. A. That's right."

For some reason unknown to plaintiffs, defendant included in its argument concerning the "implement of danger" doctrine the case of the *J. C. Penny Co., Inc. v. Robison*, 128 O. S. 626 (1934). As pointed out by defendant,

Mrs. Robison slipped on the floor of the Penny store. She claimed it had been improperly oiled and made dangerously slippery. She offered *no evidence* that the oil was not carefully applied and based her claim of negligence essentially on the fact that she slipped and fell. This case is readily distinguishable from the case at bar in that in the cited case *no evidence* was offered concerning defendant's negligence, whereas in the case at bar, there is ample evidence to show that defendant was negligent in the manufacture of the particular wheel.

At pages 10, 11 and 12 of defendant's brief, defendant cites certain cases which it claims to be controlling in the case at bar, all of which involve a situation where the jury on the facts as given could only speculate as to what were the proximate causes of the injuries involved. In *Parker v. Gulf Refining Co.*, 80 F. (2d) 795, there were four probabilities as to the proximate cause of the injuries sustained by Mrs. Parker. Of these four, defendant could clearly not be charged with negligence for two of them. Obviously the Court was right in not submitting such a case to the jury, for at best they could only speculate as to what was the true proximate cause.

In the case of *Pennsylvania Railroad Co. v. Chamberlain*, 288 U. S. 333 (1933), there were two probabilities and the proven facts gave equal support to each of two inconsistent inferences. For one of these, defendant could not possibly be chargeable with negligence. Thus, the Court rightly instructed the jury to return a verdict in favor of the defendant railroad. The case of *E. I. du Pont de Nemours & Co. v. Wright*, 146 F. (2d) 765 (1944), is not applicable to the case at bar; indeed, the Court in that case submitted the case to the jury who found for the plaintiff, which judgment was affirmed on appeal.

In the instant case, there cannot possibly be a choice of probabilities as to how this accident occurred. Defendant went to great length in the trial court to raise the

unwarranted inference that this accident was caused by the application of excessive air pressure and now seeks to stretch this theory to a "probability." A careful examination of the record reveals that there is no justification for even the slightest inference that excessive air pressure was applied. The evidence concerning air pressure has been previously discussed at pages 7 and 8 above.

Therefore, as appears from the record, the only positive evidence going to the proximate cause of the injury in this case was given by the plaintiffs in support of plaintiffs' theory that the defects in the ferrule rivets were the proximate cause of the separation of the wheel, which resulted in plaintiff O'Donnell's injuries. There are no probabilities or inconsistent theories to be speculated upon.

Defendant's contention that there was no danger to be foreseen is readily contradicted by the testimony of Mr. Branch, defendant's chief engineer who designed the wheel. As previously pointed out, Mr. Branch at page 245 of the record stated that he would regard it as a dangerous wheel if the radial cracks were apparent to the naked eye at the time of its assembly. It is unnecessary at this point to reiterate the testimony going to show that the radial cracks were present and visible to the naked eye at the time of manufacture.

Defendant also claims that the wheel was not being used for the purpose intended when this accident occurred. Apparently defendant is not willing to agree that it is reasonable to contemplate repairs to a pneumatic tire or tube. Plaintiffs submit that common, ordinary and everyday experience proves that defendant's position is untenable.

Defendant cites the case of *Borg-Warner Corp. v. Heine,* 128 F. (2d) 657, C. C. A. 6 (1942), as controlling on the point that the manufacturer must have knowledge of the defect. The facts of the *Borg-Warner* case clearly reveal that the defect was not visible to the naked eye, nor

could it be revealed by proper inspection, since the defect was inside one of the tubes used in the construction of refrigerators. Thus, the manufacturer could not have known of the defect. On the other hand, the evidence in the case at bar clearly goes to prove that the defects concerned here were visible to the naked eye and could have been ascertained by reasonable inspection.

Defendant also cites *Schindley v. Allen-Sherman-Hoff Co.*, 157 F. (2d) 102, C. C. A. 6 (1946). The *Schindley* case turned upon the point of whether or not the stopping mechanism on a furnace gate which injured the plaintiff was defective. The evidence was uncontroverted that the stopping mechanism was bent but the only evidence offered by plaintiff to show that it was defective was an engineer's testimony that in his opinion the stopping mechanism should have been designed to withstand 85 pounds of pressure instead of 25 pounds. Such is not the situation in the case at bar. Plaintiffs agree that the design of the wheel in question is adequate but that this wheel was not manufactured in conformance with the specifications set up in the designing. Therefore, the theory of the *Schindley* case is not applicable to the case at bar.

Defendant's closing argument entitled "Some Reasons Surplusage" is devoted chiefly to the thesis that the trial court's opinion should be regarded as surplusage. In doing this, defendant has throughout its entire brief seized upon reasons why it believes the defendant's motion was and should have been granted, and now seeks to put words in the District Court Judge's mouth, thereby rewriting his opinion to suit defendant's taste.

CONCLUSION.

It is therefore respectfully urged that this Honorable Court set aside the judgment in the above cause and remand this case to the District Court for a new trial.

Respectfuily submitted,

MEYER A. COOK,
DAVIS & YOUNG,
Attorneys for Plaintiffs-Appellants.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

I, J. W. MENZIES, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of Brief for Appellants filed Nov. 10, 1949; Brief for Appellee filed Mar. 23, 1950; Reply Brief for Appellants filed Apr. 3, 1950 in the case of Edward P. O'Donnell, et al. vs. Geneva Metal Wheel Company, No. 10,994, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 22nd day of January, A. D. 1951.

J. W. MENZIES,

Clerk of the United States Court of Appeals for the Sixth Circuit.

(Seal)